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IN THE UNITED STATES SUPREME COURT

THE GOOD HOLDING COMPANY, CAROLYN G. GOOD TUCKER and OWEN TUCKER,

Petitioners,

versus

FRANCES B. BOSWELL,

Respondent.

PETITIONERS' BRIEF

This brief is in support of a petition that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered March 8, 1949, rehearing of which was denied April 19, 1949, affirming the judgment of the District Court for the Southern District of Florida, entered on July 15, 1947, in a civil action for malicious criminal prosecution.

OPINIONS BELOW

The opinion of the court below and a dissenting opinion filed on March 8, 1949, are set forth in the accompanying transcript (R. 391-412), but have not yet been published. There was a dissent but no opinion on denial of rehearing.

BASIS OF JURISDICTION

Review by writ of certiorari is invoked under Title 28, **United States Code**, section 1254(1).

The opinion of the court below, together with a dissenting opinion and judgment, was filed on March 8, 1949, (R. 391-413). Petition for rehearing was filed on March 26, 1949, and was denied on April 19, 1949, one judge dissenting (R. 418). An order of the Court of Appeals staying the mandate for thirty days pending the application to this Court for writ of certiorari was entered on April 27, 1949.

SUMMARY STATEMENT

The Pleadings:

Jurisdiction rests upon diversity (R. 2-3).

The plaintiff alleges that The Good Holding Company acting through its president, Carolyn Tucker, and its employee, Owen Tucker, manager of the cocktail lounge, and the defendants, Carolyn Tucker and Owen Tucker, maliciously and without probable cause caused the plaintiff's arrest, on a charge subsequently dismissed, and that the plaintiff was thereby damaged (R. 2-5).

The defendants admitted the arrest and the dismissal of the charges, but denied causing the arrest, denied that the charges were lodged maliciously, denied that they were without probable cause, and denied the agency of Owen Tucker for the Good Holding Company and for Mrs. Tucker. The defendants further answered that the

information and warrant were filed by the county solicitor upon independent investigation, and that the plaintiff's arrest and prosecution were the acts of the State and were in no way caused by the defendants. (R. 5-10).

The Trial:

Undisputed evidence of the witnesses for both parties disclosed the following:

In 1946, The Good Holding Company owned the Good Hotel in which there was a cocktail lounge, the Music Box Club. Mrs. Carolyn Tucker was the majority stockholder, president, and treasurer of the holding company. (R. 210). She, together with a manager, not to be confused with Mr. Tucker, operated the hotel. After his discharge from the army in January, 1946, Mrs. Tucker's husband, Owen Tucker, assumed certain duties in the cocktail lounge (R. 93, 253, 106). He did not consider himself an employee or agent of the company (R. 94), nor did Mrs. Tucker consider him one. "All I did was to try to help my wife, who was sick" (R.94).

During the period from January through March, 1946, the hotel auditor's report had indicated a marked fluctuation in the cost of sales at the cocktail lounge. The Tuckers were advised that this indicated either shortages in the liquor delivered, thefts of the liquor in stock, or thefts of money paid for the liquor sold (R. 101, 123, 154). In an effort to eliminate this loss, Owen Tucker personally checked every bottle received (R. 75). He reinforced the liquor store room and installed a "French key" lock, retaining the key himself (R. 71, 74). He reinforced the counters where display liquor was stored after closing

(R. 74, 84). The losses continued. He then detected the cashier and other employees in the lounge pocketing receipts (R. 73). In the course of replacing them (R. 72), Frances Boswell, having been recommended by an agency, was interviewed and employed by Tucker on March 18, 1946, as checker and cashier (R. 102).[1]

It was her responsibility to see that cash or a signed check was received for each item of stock dispensed (R. 25-26, 89, 109, 114). It was further her responsibility to balance the cash register account against the cash in the till. She never left her post, taking her meals behind the register (R. 138).

She was on duty from 5:00 P. M. to 1:00 A. M., six days a week (R. 27). The lounge was also open in the afternoon, but the business done was negligible. When she reported, occasional discrepancies never as much as a dollar, which resulted from the afternoon sales, were corrected and she began with a clean slate (R. 137). There were two bartenders and two waiters in the lounge. Drinks were also picked up by room service waiters. These orders, as well as those within the lounge, went through Frances Boswell's register. A small beach bar was operated independently (R. 108).

On March 30th, Tucker contacted the Miami Detective Agency and employed them to discover the cause of the discrepancy revealed by the hotel audit (R. 214, 100). He had no particular culprit in mind (R. 207). The agency advised him to install a new cash register which would provide a visible record of the account of each charge as

[1] Frances Boswell testified that she began on March 15th (R. 25), but appeared to have been confused (R. 54).

the charge was made. Tucker installed the new register on March 27th (R. 103, 168).

The register maintained two tallies, one of the orders filled, the other of cash received (R. 152). The cashier thus had a double duty. She had to effect a balance between the tally of sales made, on the one hand, and the cash in the till plus the signed checks, on the other.

On March 29, 1946, two days after he had installed the new register, Mr. Tucker and his wife went to Cuba for three days (R. 129). During this period six operators from the detective agency observed the employees in the cocktail lounge (R. 100, 215, 221). On the afternoon of March 29th (R. 223), two of the operatives,[2] one of whom had been a bartender himself, made an ounce by ounce inventory of the liquor in the lounge (R. 232). In the evenings, they and the two other detectives visited the lounge and prepared reports on the conduct of the lounge employees (R. 377, 384). On April 2nd, a second inventory of the liquor was made (R. 368-376).

When Mr. Tucker returned from Cuba, he received the report from the detective agency which disclosed that there was a difference between inventories of $1179.55 worth of liquor (R. 191).

He and the detectives compared this figure with the

[2] The record discloses something of the qualifications of these men. John W. Canada had two years experience with the agency. Prior to the war, he was on the police force. Before that he had been a deputy sheriff (R. 254). At the time of the trial, he had become an auditor for the Florida National Bank (R. 253). Archie W. St. John had worked for the agency for close to two years. He had done investigative work for the Army Intelligence for fifteen years (R. 214).

sales recorded during the period. There was a discrepancy of $311.65 (R. 191). He found, in addition, that the register tallies of cash received during the evenings covered by the inventories exceeded the cash on hand by $10.80 (R. 148). He noted the detective agency's report (R. 377-384), excluded from evidence, which accompanied the two inventories (R. 368-376), admitted in evidence. With this evidence, and with other evidence in dispute, he went, on April 1st or 2nd, to his insurers who covered him against such losses (R. 162). His claim was subsequently paid (R. 124).

Shortly thereafter he received a call from the county solicitor's office (R. 98). He went there together with Mrs. Good (R. 15[illegible]). They were asked who owned the hotel. Mrs. Good gave the facts (R. 210). They were asked, "What is your trouble—What is wrong?" (R. 128). Mr. Tucker then showed the solicitor the detectives' reports including the inventories (R. 130, 268). The solicitor asked for and was given the names of the detectives (R. 249). Mrs. Tucker made no complaints (R. 209). Tucker stated what he had seen (R. 211).

After this first interview, Tucker was again called to the solicitor's office. He went alone (R. 159, 260), but met there the detectives who had taken the inventory (R. 121). They had also been called by the solicitor. They were questioned briefly (R. 147, 257, 158). They answered his questions fully and truthfully (R. 221, 234). The solicitor said that he would file an information (R. 220, 257). Nothing was said about who would be arrested or when the arrests would take place (R. 125, 146).[3] No oaths were

[3] John Canada testified, with some hesitation, that the names of the persons to be arrested were mentioned, but agreed that no time of arrest was discussed (R. 263-264).

given (R. 159). Neither the detectives nor Tucker signed an affidavit, information or warrant (R. 120, 177, 178). Nothing further was said.

At about 10:00 P. M. on April 4th, two deputy sheriffs appeared at the lounge with warrants (R. 31). The validity of these warrants is not questioned. They took the bartenders into a dressing room. Mr. Tucker, thinking the arrests over (R. 121), then introduced a new bartender to Frances Boswell and told her to break him in, saying "Murphy won't be with us any longer" (R. 31, 32, 66). The sheriffs took the waiter into the dressing room. Five minutes after Tucker had introduced the new bartender to Frances Boswell, she, Murphy, a bartender, and Clifford, a waiter, were arrested (R. 66). Burke, the other bartender, had left the lounge before the arrival of the sheriffs. He was arrested subsequently (R. 42).

The plaintiff was placed in jail over night and released on bond the following day. The arrested employees were bound over after a hearing on April 11th (R. 37). They were tried in the Criminal Court of Record on April 25th and the charges were dismissed after two of the state's six witnesses had been called. The entire proceedings are in the record (R. 182-198). The charge was embezzlement of $311.00 cash. The detective that testified was confused by the court's questioning (R. 230-231). Upon his failure to testify to the conversion of cash rather than liquor, the court dismissed the charges.

Frances Boswell was employed one week between the hearing and the trial (R. 36). She also worked for a month to six weeks as cashier after the trial. She then returned to Indianapolis (R. 43). In October she worked as a hat

check girl until she left because she was not being paid enough (R. 46). She stated that Tucker did not interfere with her subsequent employment (R. 46). Burke, one of the arrested bartenders, in testifying for the plaintiff, stated that after the arrest he worked when he wanted to (R. 92).

The above account emerged from the unchallenged evidence of witnesses for both parties. The matters discussed below were disputed.

Frances Boswell testified that she had heard Owen Tucker say to his wife at the hearing, "Boy, we've got the goods on them this time. Ten years is a long time for embezzlement." (R. 42).

The defendants denied any malicious spirit whatsoever (R. 119, 199) and denied that they had in any way instituted or pressed the arrests. The plaintiff and her witnesses admitted that no malice, ill-will or lack of consideration had been shown by either of the Tuckers apart from the above statements imputed to Mr. Tucker (R. 64, 58).[4]

As to the actual conduct of the employees in the lounge, there was a sharp conflict in the testimony. The arrested employees and one previously discharged bartender denied that there had been any deviation from that prescribed for them by Mr. Tucker (R. 76, 265). The

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[4] "Counsel for Defendant: She (Mrs. Tucker) was always a perfect lady in her dealings with you?
Michael Gordon (discharged bartender): Yes.
Q. The only man you made any complaint against then is Mr. Tucker?
A. I did not have any complaint against him" (R. 82).

procedure to be followed, as noted above, was not disputed. The employees further testified that there had been no complaints of their conduct (R. 28, 45, 67, 73).

Mr. and Mrs. Tucker and the detectives, on the other hand, each testified that on numerous occasions they had seen Frances Boswell ring up less cash than she received, ring up a charge much lower than the price for the liquor served (R. 202-204, 219, 255), and transfer money from the till to her purse (R. 201). "It is evident that the checker, waiters, and possibly the bartender, are working together" (R. 377).

The detectives testified that they had seen Frances Boswell, as well as waiters and bartenders, write an amount on a slip of paper, present it to customers and pocket the proceeds, nothing being recorded on the register and nothing finding its way into the till (R. 204, 217, 218, 255, 261, 263, 111). The detectives also testified that they had ordered imported liquor, had received domestic liquor, had been charged the price for the former, and had seen no check but had seen the sale recorded at the price of beer (R. 217-219).

Frances Boswell stated that her register tallies had always checked within at most a few pennies, though she often stayed an hour or longer checking them with Mr. Tucker (R. 55, 265). She stated they were always reconciled (R. 28, 58). Mr. Tucker exhibited a book in which he had recorded the discrepancies (R. 162), indicating that the tallies checked on only one night (R. 132, 166). The discrepancies varied from 40c to $18.10 (R. 148, 134). He

was never able to reconcile them (R. 133).[5]

On the night before Frances Boswell's arrest, Mr. and Mrs. Tucker had stood over her the whole evening. On that occasion $18.10, more in cash was received than was accounted for by the charges (R. 134, 136).

Trial Court's Theory of the Case:

The court filed no opinion. It is, however, clear from the charge that the Court considered the sole issue to be a narrow question of fact.

> "The question that you have in analyzing this testimony is not whether or not the defendants brought about this prosecution, instituted it, but whether or not they in good faith made a full, fair and complete disclosure of all the facts to the prosecuting attorney, and when you sift the case down that is going to be what you gentlemen are going to have to decide on this testimony. There is some conflict there on that. As you recall, the plaintiff testified that during her entire employment that she was never checked up short except just a few cents variation and that they always reconciled those small errors that were found on her tape at the end of her day's work. That is the testimony of the plaintiff.
>
> "The testimony of the defendant is, as you will recall, that the plaintiff was continuously short in her accounts. Now, there is a conflict and there is a conflict you gentlemen have to reconcile" (R. 298-299).

[5] That the figure $8.10 (R. 148, line 15) should read $18.10 is apparent from the testimony which follows immediately.

The issue of agency was withheld by the Court from the Jury (R. 296-297).

Reserving its ruling (under Rule 50) on defendant's motion for a directed verdict (R. 279), the Court sent the case to the Jury. The Jury returned a verdict in favor of Frances Boswell for $7000 (R. 304).

Defendant's motion for a new trial on the grounds of newly discovered evidence as well as error in the original trial, and defendant's motion to amend were denied (R. 384). Thereupon the judgment (R. 309) became final, and from it defendant appealed.

Proceedings in the Court of Appeals

The judgment for the plaintiff was affirmed by the Court of Appeals for the Fifth Circuit by two members of the court on March 8, 1949. (R. 413). Petition for rehearing was denied on April 19, 1949 (R. 418). One circuit judge dissented to both orders. The mandate was stayed for thirty days by an order entered on April 27, 1949.

The majority opinion reviews the testimony extensively (R. 391-402) and concludes that the verdict finds support in the evidence (R. 402). The majority next, in one page, concludes that there is "no prejudicial error in either the oral charges given, or the requested charges refused." (R. 404). The charges are not discussed, nor is the law reviewed. Two federal decisions are cited as direct authority, and two Florida decisions are cited as parallel authority for this conclusion (R. 404).

The dissent takes the position that in four particulars

the District Court erred in presenting the case to the jury (R. 405-412). The dissent relies on five Florida decisions, discussing two of them with some particularity.

SPECIFICATION OF ASSIGNED ERRORS

In this civil action for malicious criminal prosecution, *where the local law is clearly to the contrary*, the Court of Appeals erred in sanctioning the conduct of the District Court in presenting the case to the jury, wherein:

(1) The District Court refused to submit the question whether any of the defendants did in fact institute the criminal prosecution of the plaintiff.

(2) The District Court instructed that if one of three defendants was guilty, all were, though the only evidence of malice or of instigation was as to one of the defendants.

(3) The District Court so defined malice that any prosecution to stop stealing would be malicious.

(4) The District Court, in its charge on the measure of damages, specified only that the verdict could not exceed the amount claimed in the complaint, with the result that judgment was for the plaintiff in the amount of $7000, though the plaintiff was in jail but one night and there was no evidence of actual damage.

ARGUMENT

I.

THE TRIAL COURT ERRED IN REFUSING TO SUBMIT THE QUESTION WHETHER ANY OF THE DEFENDANTS DID IN FACT INSTITUTE THE CRIMINAL PROSECUTION OF THE PLAINTIFF.

1. **An appropriate request to charge was made, refused and excepted to.** The following request to charge was made by defendants below:

> "We would like for you to instruct the jury to the effect that if either Mr. or Mrs. Tucker did not know that this particular lady was going to be arrested upon the information that was communicated to them by these detectives, that under those circumstances they could not be held liable for her arrest." (R. 288).

The trial court denied the request and noted an exception:

> "I deny that charge. I will deal with it in a charge of my own . . . Let the record here show that exceptions are allowed to each counsel for each party to my refusal to give the charges requested as requested and an exception is allowed counsel for each, plaintiff and defendants, to the charges I give on my own account." (R. 289).

2. **The trial court's charge in effect removed the issue from the jury.** The charge of the District Court on the

question of whether the defendants instituted criminal prosecution against the plaintiff was as follows:

> "The question that you have in analyzing this testimony *is not whether or not the defendants brought about this prosecution, instituted it*, but whether or not they in good faith made a full, fair and complete disclosure of all the facts to the prosecuting attorney, and when you sift the case down that is going to be what you gentlemen are going to have to decide on this testimony." (R. 298).

3. **The trial court's instruction was in direct conflict with local law.** In a consistent line of cases, the Supreme Court of Florida has held that the instigation of the criminal proceeding by the defendant is the first of five elements each of which the plaintiff must prove or suffer a directed verdict. In **Ward v. Allen,** 152 Fla. 82, 11 So. 2d 193, 194 (1943), the Florida court said:

> "To succeed in his suit it was plaintiff's burden to prove: (1) the instigation of the criminal proceeding by the defendant; (2) its termination in favor of the plaintiff; (3) the exercise of malice by the defendant; (4) want of probable cause for the prosecution; and (5) damage. As we understand our former decision these elements must concur and the failure to establish any one of them by a preponderance of the evidence would be good ground for the granting of a motion for a verdict favoring the defendant."

Identical language is used by the court in **Tatum Bros. Real Estate & Inv. Co. v. Watson,** 92 Fla. 278, 109 So. 623, 626 (1926); **Duval Jewelry Co. v. Smith,** 102 Fla. 717, 136

So. 878, 880 (1931); **S. H. Kress & Co. v. Powell,** 132 Fla. 471, 180 So. 757, 762 (1938). This is also the language of the **A.L.I. Restatement, Torts,** v. 3, §672(1).

It is settled in Florida that the advice of counsel based on a complete disclosure is a complete affirmative defense, **Duval Jewelry Co. v. Smith,** ibid.; and similarly that the advice of a prosecuting attorney based on a complete disclosure is a complete affirmative defense. **Florida East Coast R. Co. v. Groves,** 55 Fla. 436, 46 So. 294, 297 (1908).

It is clear, therefore, that the District Court confused the requirements of a complete, affirmative *defense* with those of an *element* which the plaintiff had the burden of establishing. The effect of this confusion was to relieve the plaintiff of his burden to prove instigation by the defendant, and to impose upon the defendant the burden of exonerating himself.

Full disclosure has nothing to do with the question of whether the defendant instigated the prosecution. As stated in 1 **Cooley on Torts,** 413-414:

> "If one merely furnished the prosecuting officer with the facts, and the latter, on his own judgment, commences a prosecution, making use of the former as a witness, this is not a prosecution by the witness, and unless he interferes improperly afterwards, he cannot be held responsible as having instituted it, and the mere fact that, as a witness, he wilfully and maliciously gives false testimony will not render him liable for malicious prosecution."

To institute a criminal prosecution, one must force the

authorities into action; merely giving information or making accusations does not instigate a prosecution. In the language of the **A.L.I. Restatement, Torts,** v. 3, §653:

> "Criminal proceedings are initiated by making a charge before a public official or body in such form as to require the official or body to determine whether process shall or shall not be issued against the accused. Thus . . . a sworn charge upon which a warrant of arrest is issued, initiates the criminal proceedings of which the issuance of a warrant is the institution . . . It is, however, not enough that some act of his should have caused the third person to initiate the proceedings . . . The giving of information or the making of the accusation, however, does not constitute a procurement of the proceedings which the third person initiates thereon if it is left to the uncontrolled choice of the third person to bring the proceedings or not as he may see fit."

The plaintiff in this action was prosecuted in the Criminal Court of Record, Dade County, Florida. **Florida Statutes Annotated** (1941) §32.18; C.G.L. 1927, §8257 provides that:

> "All offences of which the criminal court of record has jurisdiction, shall be prosecuted upon information filed by the county solicitor under oath."

Prosecution in this court is thus always left to the uncontrolled discretion of the county solicitor. No one made sworn charges against the plaintiff. (R. 159). It is undisputed that the solicitor obtained information from others, as well as from the defendants (R. 121). Of the

tests set forth in the **Restatement**, therefore, none were present in our case.

Turning to the Florida decisions, there are only four decisions in favor of the plaintiff. In three cases the defendant had signed a paper which had the legal effect of forcing authorities into action. **Tobey v. Orr**, 92 Fla. 964, 111 So. 110 (1926) (affidavit before justice of peace); **Anderson v. Bryson**, 94 Fla. 1165, 115 So. 505 (1927) (affidavit before magistrate); **Perez v. Rodriquez**, 155 Fla. 501, 20 So. 2d 654 (1945) (lunacy petition). In the remaining case, the earliest one, the opinion does not show what the defendant did. **Lewton v. Hower**, 35 Fla. 58, 16 So. 616 (1895).

In **Fisher v. Payne**, 93 Fla. 1085, 113 So. 378, 381 (1927) the court in an action for malicious prosecution held that to "institute a lunacy proceeding, a defendant must be shown to have taken the statutory step which starts the proceeding, i. e. file the lunacy petition. And in its most recent malicious prosecution case, the Florida court specifically held that instigation was established where the defendant signed an affidavit which was the sole basis for both the warrant and the affidavit. **Ward v. Allen**, 152 Fla. 82, 11 So. 2d 193, 194 (1943).

The Florida court has, therefore, consistently required the plaintiff to prove that the defendant made the sworn written charges which in law initiated the proceedings. In thus defining the first element of the cause of action, the Florida court has been in complete accord with the great weight of authority elsewhere as expressed in the **Restatement.**

In our case only one of the defendants gave any information to the county solicitor. At least two others, not parties, gave him information. All did so at the solicitor's request. No one made a sworn charge, written or otherwise. The District Court, in removing from the jury the issue of whether the defendants instituted the prosecution, deprived them of their best defense. In approving the trial court's instruction, the Court of Appeals patently ignored the law of Florida.

II.

THE TRIAL COURT ERRED IN INSTRUCTING THAT IF ONE DEFENDANT WAS GUILTY, ALL WERE, THOUGH THE ONLY EVIDENCE OF MALICE OR OF INSTIGATION WAS AS TO BUT ONE DEFENDANT.

1. The issue of agency was properly raised but was withheld from the jury. It was alleged (R. 3) and denied (R. 5-6) that the Good Holding Company acting by its agents, Mr. and Mrs. Tucker, caused the plaintiff's arrest. The trial court early took the view that there was no agency question raised. (R. 64). He religiously adhered to this view (R. 296, 288) and instructed as follows:

> "If there is any liability in this case, if you gentlemen find any liability in this case to the plaintiff, then the conduct of these individuals, the defendants, makes the hotel liable." (R. 297).

Exception was entered to this charge (R. 289).

2. The only evidence of malice or of instigation was

as to but one defendant. There is not a shred of evidence that Mrs. Tucker played any active role in the prosecution of the plaintiff. In fact, the plaintiff, herself, testified that she and Mrs. Tucker had no differences (R. 63, 64), which was verified by Mrs. Tucker (R. 199). All Mrs. Tucker did was to admit to the solicitor that she managed the Good Company. From then on she played a passive role (R. 210-212). As to the liability of the Good Holding Company, there is not even a suggestion that any agent of the Company, other than the Tuckers, played any part in the prosecution of the plaintiff.

3. **An agent has no implied authority to institute a criminal prosecution for acts already done.** This is the precise holding of the Florida court in **Winn & Lovett Grocery Co. v. Archer** 126 Fla. 308, 171 So. 214, 217 (1936), where the court said:

> "There is a marked distinction between a false imprisonment or arrest caused by an agent for the purpose of protecting property, or recovering it back, and an arrest or imprisonment caused for the purpose of punishing an offender for an act already done. Ordinarily, there is no implied authority in a servant having the custody of property, to take such steps as he thinks fit to punish a person who he erroneously supposes has committed a crime against the property, and the trend of decision is against holding the master liable when the arrest has been made after the supposed crime has been committed, and not for the protection of his property or interests. In such cases the agent is presumed to have acted on his own account, for the vindication of justice since his agency relates solely to the property, and the act of punishing

the offender is not anything done with reference to it."

This rule is, apparently, also the rule elsewhere. 3 **Restatement, Torts** §673; 1 **Cooley on Torts** 416; 34 **American Jurisprudence** 758-759.

4. **The trial court erred in withholding the issue of agency from the jury.** There is not the slightest evidence of any express authority on the part of Owen Tucker. There is no evidence of any direct liability on the part of any defendant other than himself. There is, by settled local law, no basis for imputing Tucker's liability to his wife and her company if the arrest was caused for the purpose of punishing an offender for an act already done. The plaintiff's own testimony indicates that this was the purpose (R. 26, 30, 76, 42). To affirmatively instruct that the liability of one defendant established the liability of all was plainly in contradiction of Florida law.

III.

THE TRIAL COURT ERRED IN SO DEFINING MALICE THAT ANY PROSECUTION TO STOP STEALING WOULD BE MALICIOUS.

The trial court's instruction on malice was worded thus:

> "In a case of this character, malice does not have a technical meaning of a personal hatred or dislike of the individual prosecuted. It may mean that the person bringing about the prosecution was prompted by motives they consider advantageous to them in causing the prosecution to be brought about." (R. 298).

Exception was noted to this charge. (R. 289).

By this instruction, any prosecution to stop stealing of property in the custody of the instigator would be malicious, and if the prosecution failed, the instigator would be liable in damages. The effect of this charge is in direct conflict with the familiar proposition that the law does not favor actions for malicious prosecution, which is stated by the Florida court in **Florida East Coast R. Co. v. Groves,** 55 Fla. 436, 46 So. 294, 296 (1908):

> "If every man who suffers by the perpetration of a crime were bound under the penalty of heavy damages to ascertain before he commences a prosecution that he has such evidence as will insure a conviction, few prosecutions would be set on foot, the guilty would escape while conclusive evidence was sought for, offenses of every grade would, for the most part, go unpunished, and the penal law would be scarcely more than a dead letter."

IV.

THE TRIAL COURT ERRED IN ITS CHARGE ON THE MEASURE OF DAMAGES IN SPECIFYING ONLY THAT THE VERDICT COULD NOT EXCEED THE AMOUNT CLAIMED.

The District Court's instruction on the measure of damages was:

> "The amount of damages is a matter for you gentlemen to determine, an amount that you gentlemen as business men are authorized to determine not to ex-

ceed the amount claimed in the complaint in this case." (R. 298).

Exception to this charge was noted (R. 289).

The verdict and judgment were for $7000 (R. 304), though the plaintiff was in jail but one night and her subsequent employment was unaffected by her experience (R. 36, 43, 46). Another arrested employee, testifying for the plaintiff, stated that his subsequent employment was not affected by his arrest (R. 92).

It is the settled law of Florida that exemplary damages must be pleaded to be recovered, and that the ordinary allegations in malicious prosecution do not satisfy this requirement. **Winn & Lovett Grocery Co. v. Archer**, 126 Fla. 308, 171 So. 214, 222 (1936). There was, therefore, no predicate in this case for the award of other than compensatory damages. The jury was not so instructed. It is evident from the size of the verdict that the jury did not restrict itself to compensatory damages.

Three comparatively recent decisions from other jurisdictions make it clear that the award in this case was clearly out of line. In **Peel v. Brammett**, 298 Ky. 20, 181 S. W. 2d 448 (1944), the verdict for $7500 was held excessive, the court saying:

> "She showed no special or pecuniary damage except $150 for attorney fees for defence in the criminal prosecution, and aside from that item the only injury sustained by appellee justifying substantial damages were mental suffering and injury to her reputation."

In **Anderson v. Snell,** 57 Nev. 78, 62 P. 2d 703 (1937), the verdict was for $8600 and a remittitur of $6100 was ordered. And in **Curls v. Lenox Garage Co.,** 68 Ohio App. 285, 40 N. E. 2d 213 (1942), a verdict of $2500 was held excessive. The court stated that $500 for humiliation, mental anguish and punitive damages was adequate together with $782 for actual loss of wages. No recovery for damage to character or reputation was permitted, because plaintiff offered no evidence in support of such loss.

All of these cases, like ours, were malicious prosecution actions where the plaintiff had been prosecuted for embezzlement.

CONCLUSION

In this case, the jury returned a verdict for $7000 against a man, his wife, and her hotel, where the man had hired private detectives to investigate his wife's employees and surrendered the detectives' reports to the county solicitor at his request. The solicitor in turn caused the arrest of the employees, after conferring with the detectives, and failed to get convictions solely because he charged the wrong crime.

The verdict followed instructions given by the District Court which were in direct opposition to the settled law of Florida, the law that the court was bound to apply.

The Court of Appeals affirmed, refusing to apply or even discuss the clearly expressed law of Florida.

We join the dissenting circuit judge in saying that "the trial was not according to law in the points above discussed, and a new trial is due to justice." We add that the majority of the Court of Appeals, ignoring the doctrine of the *Erie* case, has entirely rewritten the Florida law of malicious prosecution.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

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